83-1504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83....

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

INTERNATIONAL HARVESTER COMPANY,
Defendant,

v.

GEORGE S. MCLEAN,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, the indictment of the Petitioner in the *Crawford* case as an alleged participant in a conspiracy to bribe high-level Pemex officials ("bribery scheme") deprived the Petitioner the protection of the Fifth and Sixth amendments to the Constitution of the United States, so that the United States could with impunity, identify and describe but not charge the Petitioner in the *Harvester* case as a participant in the bribery scheme?

2. Whether the United States and International Harvester Company ("Harvester") violated the Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution by acting in concert through their respective lawyers to negotiate a plea bargaining agreement that made the Petitioner a scapegoat so that Harvester, by a disclaimer of knowledge of the Petitioner's actions, manuevered itself into a minimum fine of $10,000 vs. the $1,000,000 fine provided by the FCPA, and the United States obtained a third FCPA guilty plea in the bribery scheme cases?

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The Petitioner respectfully prays that a writ of certiorari be issued to review the Order and Opinion of the United States Court of Appeals for the Fifth Circuit entered on November 28, 1983, which affirmed the District Court's Order which denied the Petitioner's Motion to Expunge.

JURISDICTION

An order and opinion was rendered by the United States Court of Appeals for the Fifth Circuit affirming the District Court's order to deny the Petitioner's Motion to Expunge. A copy of these orders and a copy of the Order Denying the Petition for Rehearing and Denying the Suggestion for Rehearing En Banc are found in the Appendix.

The order affirming the District Court's order was entered on November 28, 1983. Timely motions for Panel Reconsideration and Suggestion for Rehearing En Banc were filed and were denied December 29, 1983. This Petition for a Writ of Certiorari has been filed within the statutory period provided by 28 U.S.C. § 2101(c).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Attention is invited to the fact that the constitutional issues and factual background involved in this Petition for a Writ of Certiorari are related to similar issues in the Petition for Writ of Certiorari received by the Supreme Court on November 22, 1983, *Ignacio DeLeon Martinez, et al* vs. *United States Attorney General William French Smith, et al*, Dkt. No. 83-848.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

1 U. S. Constitution, Fifth Amendment

2 U. S. Constitution, Sixth Amendment

3 28 U.S.C. §1254(1)

4 28 U.S.C. §2101(c)

5 15 U.S.C. §78dd-1(a)(1) and (3)

6 15 U.S.C. §78dd-2(a)(1) and (3), §78dd-2(b)(1) thru (4)

7 15 U.S.C. §78dd-2(d)(1)

8 15 U.S.C. §78ff(c)(1) thru (4)

9 18 U.S.C. §3

10 18 U.S.C. §371

11 H.R. Report 95-640 (1977)

12 H.R. Report 95-831 (1977)

13 H.R. Report 95-11, pages 225-233

14 U.S. Attorney's Manual, §9-11.225

15 U.S. Supreme Court, Rule 17.1

STATEMENT OF THE CASE

This appeal stems from the Fifth Circuit's affirmation of the Trial Court's denial of the Petitioner's application for expungement in *U. S.* v. *International Harvester Company*, Cr. No. H. 82-244 (S.D. Tex. 1982) a case in which the Petitioner had been described but not charged as a participant in a scheme to bribe Mexican officials.

Petroleos Mexicanos ("Pemex") is the national petroleum company of Mexico. From 1977 to 1980 Pemex carried out an accelerated development program so that crude oil production would be increased from 1.1 to 2.2 million barrels per day by 1980, with the greater part of the increase sold for export. Approximately 2 billion cubic feet of raw natural gas known as "associated gas" was produced with the increased oil flow and was initially flared. The 1976 National Energy Plan, ("PLAN") earmarked this associated gas to be processed in new plants for the removal of corrosive sulfur compounds and hydrocarbon liquids.The Mexican government issued an order in 1977 to stop flaring the associated gas. It was necessary for Pemex to accelerate the purchases of large quantities of turbine compressor equipment to capture the associated gas and pump it to the processing plants.

The Solar Division ("Solar") of International Harvester Company ("Harvester") was the dominant worldwide supplier of the type of turbine compression equipment needed. Solar had supplied Pemex with approximately 70% of their requirement for similar equipment in the previous 5 years either as a prime contractor or as a subcontractor.

Petitioner, an 18 year employee of Solar/Harvester, was a vice president of Solar, the president of Solar Turbines, Ltd., a 200 employee *Harvester* overseas subsidiary, and had worldwide sales and services responsibilities for Solar. During the period involved in the *Harvester* case, the Petitioner was on the Harvester corporate payroll and was paid from Harvester's

headquarters office in Chicago. The Petitioner participated in Harvester's executive incentive plan and stock option plan. The Petitioner reported directly to O. M. Sievert, ("Sievert") the president of Solar. Harvester commenced preparations to sell Solar in the fall of 1980. Sievert was a Harvester officer from 1974 to 1980. The Petitioner first learned of the references to him in the Harvester Information and Offer of Proof while sitting in the courtroom during the *Harvester* arraignment hearing on November 18, 1982, when he heard the accusations against him.

Crawford Enterprises, Inc. (CEI) was a broker and lessor of gas compression systems of all types and sizes. Solar had sold equipment to CEI for resale or lease over a period of several years. Solar, from time to time, acted as a subcontractor for CEI which contracted with Pemex to build complete compression plants.

In early 1979, the United States initiated the first of several grand jury investigations into the alleged bribery of and conspiracy to bribe Mexican officials in violation of the Foreign Corrupt Practices Act ("FCPA").

In the fall of 1982 the Government instituted four criminal cases allegedly involving a scheme to bribe Ignacio DeLeon Martinez ("DeLeon") and Jesus Chavarria ("Chavarria"), both of whom were high level officials in Pemex.

On October 22, 1982, the United State indicted the Petitioner in one of the cases, *U. S.* v. *Crawford Enterprises, Inc., et al*, Cr. No. H-82-224 (S.D. Tex. 1982) and described the petitioner as being a participant in the conspiracy to pay bribes to DeLeon and Chavarria totalling $9,960,432.40. The 42 page *Crawford* indictment contained 49 counts charging CEI and 9 individuals. The alleged violations covered the time period from December 19, 1977 to May 1980. The Petitioner and another Solar employee, Luis A. Uriarte, ("Uriarte") were two of the nine individuals charged with conspiracy in Count 1, and with aiding

and abetting substantive violations of the FCPA in 43 of the remaining 48 Counts in the *Crawford* indictment.

The District Court dismissed the 43 aiding and abetting Counts against the Petitioner and Uriarte in June 1983 pursuant to the provisions of the "Eckhardt amendment" to the FCPA, 15 U.S.C. §78ff(c)(3).[1]

The Petitioner was charged in 43 Counts in the *Crawford* case in his individual capacity as a domestic concern under §78dd-2 and not in his capacity as an employee of Harvester in its position as an issuer under §78dd-1. The Petitioner is described in the *Harvester* case in his individual capacity as a domestic concern under §78dd-2 and for *respondeat superior* purposes in the *Harvester* case is described and treated as an employee of Harvester under §78dd-1.

Prior to the filing of the *Crawford* and *Harvester* cases, the United States had negotiated plea bargains in the *Miller*[2] and *Ruston*[3] cases.

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[1] 15 U.S.C. §78ff(c)(3). Whenever an issuer is found to have violated Section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen — and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000 or be imprisoned not more than five years, or both.

[2] On September 17, 1982 *United States of America* v. *C. E. Miller Corporation and Charles E. Miller*, Cr. No. 82-288 (C.D. Cal) was filed. On September 20, 1982 Charles E. Miller and C. E. Miller Corporation ("CEMCO") pled guilty to the Information that had been filed on September 17, 1982 charging them with aiding and abetting CEI's violation of the Foreign Corrupt Practices Act by travelling in a commercial aircraft from Los Angeles, California to Houston, Texas. On November 23, 1982 Charles E. Miller executed an affidavit acknowledging the entry of the foregoing guilty pleas and stating that "In connection with the Affiants [Miller] pleas of guilty neither Affiant, nor CEMCO, offered, promised or agreed to pay or paid, monies to or for either Ignacio DeLeon Martinez or Jesus Chavarria".

[3] On September 23, 1982 *United States of America* v. *Ruston Gas Turbines, Inc.*, Cr. No. H-82-207 (S.D. Tex) was filed. Ruston Gas Turbine, Inc. ("Ruston") pled guilty to a Information filed the same

On the afternoon of November 17, 1982 in Federal District Court in Houston, Harvester was charged under 18 U.S.C. §371 in a one-count Information with the felony of conspiracy to violate the FCPA, 15 U.S.C. §78dd-2. The Petitioner and Uriarte, were identified and described in the Information and related Offer of Proof as participants in the alleged bribery scheme conspiracy. The single count *Harvester* Information, included 11 of the 12 overt acts set forth in the *Crawford* Indictment in which eleven acts, Solar, the Petitioner and Uriarte were identified by name. The *Harvester* Information identified Uriarte by name in overt acts Nos. 1, 3, 8 and 11 and identified the Petitioner in No. 11, in the same manner that they were named in the corresponding overt acts in the *Crawford* Indictment. The 12th overt act[4] from the *Crawford* case involving Harvester personnel also involved O. M. Sievert, ("Sievert"), the President of Solar and a Harvester corporate officer. This 12th overt act involved a

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date charging that on January 8, 1978, defendant Ruston through its vice president James R. Smith, corruptly used an instrumentality of interstate commerce, (a commercial aircraft) to travel from Houston, Texas to Mexico City, Mexico in furtherance of an offer, payment and promise to pay money to influence the acts and decisions of DeLeon and Chavarria in their official capacity.

In the Ruston Offer of Proof, it was stated that in October, November and December 1977, Al Eyster, President of Ruston and James R. Smith, Vice Presiden' of Ruston, were informed (and believed and expected) that monies would be paid to DeLeon and Chavarria.

At the Ruston arraignment hearing, the Court asked David Boies, counsel for Ruston, and John F. Paull, President of Ruston if Ruston through its employees did commit the acts alleged in the Information and Offer of Proof. Mr. Boies and Mr. Paull responded "as stated in the Offer of Proof."

During the course of the hearing James McDonough, the attorney for Al Eyster, advised Judge Cire that Al Eyster disputed the statements of Messrs. Boies and Paull that attributed guilt to Eyster.

[4] This overt act appears as Overt Act #24 in Count One of the Crawford Indictment.

meeting in Las Vegas with CEI and another company. No reference was made to this overt act in the *Harvester* Information or Offer of Proof. Overt Act No. 11 in the *Harvester* Information is the same as Overt Act No. 89 in the *Crawford* Indictment, except that personal references to Messrs. Crawford and Hall were deleted and "officers of CEI" was substituted.[5]

The conspiracy described in the *Harvester* Information was predicated upon a theory of *respondeat superior*. The offer of proof described Harvester's written corporate antibribery policy and contained the following statement:

> During those years, Uriarte and McLean each reported in the annual audit process that he was aware of International Harvester policy and had taken no action in violation thereof. Insofar as each of them participated in the conspiracy described herein, he accordingly concealed from International Harvester his participation and the participation of the Solar Turbine Division. Neither Solar employee held a position which required him to report to International Harvester management. There has been no evidence that any officers, directors or management of International Harvester knew of or participated in the conspiracy charged in the Information.

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[5] The Petitioner was cited in two of the 108 overt acts in the *Crawford* Indictment. Overt Act No. 89 states, "On or about January 24, 1979, defendants CRAWFORD, HALL, URIARTE and MCLEAN, along with others, met in San Diego, California to discuss obtaining additional business from Pemex."

Bateman testified to the Wash., D. C. grand jury that Sievert and Crawford "met together in a car" at this meeting. On February 17, 1984 the Government finally surrendered notes of Bateman's June 30, 1981 meeting with the United States' investigators in belated compliance with the trial court's May 27, 1983 discovery order. These notes reveal further details surrounding this meeting. However, the Petitioner was charged in the Overt Act No. 89 although there is no testimony linking him to the meeting and Sievert is not even mentioned in the "and others" in the bill of particulars.

At the November 18, 1982 Harvester arraignment hearing, the Court asked Harvester's representative "are the allegations of the conspiracy and overt act that I read to you true as to Solar, a division of International Harvester Company?" Harvester's spokesman answered, "yes they are true Your Honor, *as represented by the submission by the Justice Department*". (emphasis added).

In the late summer of 1982, U. S. Trial attorney William Pendergast ("Pendergast"), the government attorney in charge of the Crawford case asked the lawyer, employed by Harvester for Petitioner and Uriarte, if either of them would plea bargain, plead guilty and testify against the other. The Petitioner and Uriarte refused. Concurrently, Harvester's lawyers assured and advised the Petitioner, Uriarte, and Sievert that they were trying to clear Harvester and the Solar personnel from implication in the *Crawford* case.

On August 18, 1982 Sievert testified in Houston before the Grand Jury.

On October 18, 1982, Petitioner through his counsel, requested the Government to allow him to testify *without immunity* before the Houston Grand Jury. The government refused, saying it was "too late,". Houston Grand Jury 82-3 continued to hear testimony through October 19, 1982 from prospective government witnesses. Grand Jury 82-3 voted its indictment on October 20, 1982.

In the fall of 1982, Pendergast falsely advised Harvester's lawyers that the Petitioner and Uriarte were plea bargaining or were expected to do so shortly. Upon receipt of this false information, Harvester through its lawyers commenced plea bargain negotiations with the government without notifying the Petitioner and Uriarte of the negotiations. Upon hearing a rumor about the plea bargain negotiations in early November 1982, the Petitioner and Sievert confronted Harvester lawyers and officials by telephone and mail with the rumor and told them

that any representations made by the United States as to the culpability of Harvester and Harvester (Solar) employees were incorrect and that competent evidence was in existence and available to refute the contentions being made by the United States in respect to Harvester.

A plea bargain was negotiated between the United States and Harvester on the following terms:

1) Harvester would plead guilty to a charge of conspiring with CEI, the Petitioner and others to violate the FCPA.

2) The United States' Offer of Proof would state that:

(a) There was no evidence that officers, directors, or the management of Harvester knew of or participated in the conspiracy, i.e. Sievert would be sheltered and protected in the plea bargain by ignoring Sievert's status within Harvester as a Vice-President and corporate officer of Harvester even though Grand Jury testimony and the Harvester table of organization showed that Sievert was a vice president and officer of Harvester.[6,7]

(b) Harvester's management was unaware of the actions of its lower echelon employees; i.e., the Petitioner and Uriarte.

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[6] In early 1983, in the government's response to the Petitioner's Motion for a Bill of Particulars in the *Crawford* case, the Government stated that: (1) Harvester and Sievert were known to have also been part of the conspiracy to bribe Pemex officials; (2) in March 1978 Sievert participated with CEI and the Petitioner in a meeting in Las Vegas to discuss Pemex business which was the substance of the charge in overt act 24 of Count one of the *Crawford* indictment; and (3) Sievert permitted bids to be calculated.

[7] Sievert was protected from indictment in the *Crawford* case and from charges in the *Harvester* case.

At the arraignment hearing on November 18, 1982 Harvester's general counsel Elmer Johnson advised the Court as follows:

> "As to the factual basis for plea, we accept the *strong representations of the Justice Department of the United States that they have more than adequate evidence to prove* that two of our former employees of a former division aided and abetted violations of the Foreign Practices Act. *We simply are not in a position to verify these representations.* As the offer of proof points out, any such activities by these former employees would have been in full violation of Harvester's long-standing code of ethical conduct; and there is no evidence, as the offer of proof points out, that any directors or officers or management of Harvester knew about or participated in the conspiracy. Harvester has been named solely on the theory of *respondeat superior* under which management's lack of knowledge is not a defense as to the Foreign Practices Act and therefore as to the conspiracy count to which we are pleading." (emphasis added)
>
> *"Now as Your Honor may know, Harvester is in extremes.* It is in the midst of the biggest voluntary restructuring effort in the history of corporate America. . . . We are turning creditors into stockholders. Our management and financial resources are stretched to their limit. It is against this background that we have decided to plead guilty and try to put this matter behind us so that we can put all our energies into one fight for survival." (emphasis added)

Harvester was fined $10,000 and ordered to pay $40,000 in costs. Harvester noted in its 1982 annual report that it "entered a plea of guilty, in order to avoid costly litigation."

The foregoing events involving Harvester were reported by the Wall Street Journal, for example on November 16, 1982, the *Wall Street Journal* quoted a Harvester spokeswoman as stating the Justice Department — "must recognize that our management has adhered to the highest ethical standards, wasn't aware of the alleged payoffs and didn't condone them"; and on the morning of November 18, 1982 the *Wall Street Journal*

reported: "Harvester said the Justice Department will present documents in court that will include a statement by the department that there wasn't any evidence that Harvester officers, directors and management knew of or participated in the alleged conspiracy." The article concluded with a statement that guilty pleas were entered in the *Miller* and *Ruston* cases.

The Petitioner, on January 12, 1983, filed an application to expunge references to the Petitioner from the *Harvester* Information and Offer of Proof. The Application to expunge was denied on March 28, 1983. The Petitioner filed a timely notice of appeal of the denial of the expungement action on April 4, 1983 with the United States Court of Appeals for the Fifth Circuit.

In its Appellee's brief to the Fifth Circuit in the *Harvester* expungement case, the United States recognized the Petitioner's contentions concerning the applicability of the *Briggs* and *Smith* cases and Governmental misconduct in the *Harvester* case and said:

> . . . appellant was, . . ., named as a party to a bribe scheme . . . in the . . . *Harvester* case, his position is not remotely comparable to the position of the petitioners in *Briggs* and *Smith*. Before the . . . Harvester Information was even filed, appellant was indicted as a defendant in the *parent case* and that indictment delineated his involvement in the bribe scheme in almost precisely the same terms as it was set forth in the ensuing . . . Harvester proceedings. . . . (emphasis added)
>
> "Appellant simply has no standing to complain that allegations involving International Harvester's culpability set forth in a bill of particulars *deviated* from statements made in an offer of proof in connection with that corporation's guilty plea."
>
> "It is likewise of no consequence to appellant's case that, *contrary* to assertions made by government attorneys in a bill of particulars, statements were previously made in an offer of proof in the International Harvester guilty plea proceeding that the government has no evidence that

> International Harvester's own officers knew of or participated in the bribe. This assertion, the product of guilty plea negotiations between International Harvester and attorneys for the government, does not affect Appellant's interest in the least." (emphasis added.)

On October 28, 1983, Petroleos Mexicanos (Pemex) filed a civil suit, C.A. No. H-83-6418 S.D. Tex., against Harvester and sixteen other companies and individuals, for alleged violations of the Sherman, Robinson-Patman and Racketeering Acts, as well as a commercial bribery count in an alleged conspiracy involving substantially the same facts as alleged in the *Harvester* case and in Count 1 in the *Crawford* case. The Petitioner was not named as a Defendant or in any other capacity in the Pemex suit. Pemex asks for treble damages totalling $135,000,000.

In its answer dated December 23, 1983, Harvester, without any attempt to explain or reconcile its November 18, 1982 plea of guilty to a conspiracy charge based upon collaboration with CEI on pricing stated in paragraphs 42 and 43 of its answer:

> "42. Harvester denies that it joined a conspiracy with Crawford, Ruston or Cemco . . . ."
>
> "43. Harvester denies that it collaborated with Crawford, Cemco, Ruston or CEI in preparing bids to "Pemex . . . ."

When Uriarte could no longer afford staying in the case, Uriarte pled guilty to an 18 U.S.C. § 3 violation in September 1983 (specifically, withholding information from a government investigator) as part of a plea bargain. Uriarte was sentenced to 12 months probation with no restrictions.

Shortly thereafter, the government sent a written invitation to the Petitioner to negotiate a plea bargain that was similar to the one negotiated with Uriarte. The Petitioner refused the offer of the plea bargain.

The *Crawford* case was originally scheduled for trial in early August 1983. After several postponements, it was scheduled

firmly for trial first on January 9, 1984 and then on February 13, 1984. On December 27, 1983 the United States sought a one week continuance of the *Crawford* case until January 16, 1983 so the United States could take depositions of Swiss bank officials to allegedly show that five million dollars of at least ten million dollars of alleged bribes earmarked for DeLeon and Chavarria could be traced to Swiss banks. Mr. Pendergast's affidavit in support of the continuance states:

> "It is the Government's belief that these Swiss records will show that ownership of these bank accounts is in either the name of, or under the control of, Chavarria and DeLeon. This will complete the link of tracing funds between the defendants and the foreign officials whom they are accused of bribing."

On January 31, 1984, seven days after a trial court order excluding certain circumstantial evidence, the government advised the Court that "the risk of proceeding to trial without this critical evidence is so great" that it filed an appeal to the Fifth Circuit and filed for another continuance in hope that "direct" evidence from Switzerland becomes available while the appeal is pending.

In a letter to Judge Cire dated January 31, 1984 Mr. Pendergast stated:

> "If the direct evidence from Switzerland becomes available while the appeal is pending, we will promptly seek a remand in order to resolve the pending motion for authorization under Rule 15 to obtain the evidence in admissible form from Switzerland."

On February 3, 1984, the Judge took the trial off the docket pending resolution of the matter by the Fifth Circuit.

In light of the delay in the trial date in the *Crawford* case, the Petitioner has renewed his motion to dismiss the *Crawford* indictment in respect to the Petitioner on the grounds that the Petitioner has been denied a speedy trial.

REASONS FOR GRANTING THE WRIT

Review on Certiorari is merited under Rule 17.1 of the Rules of the Supreme Court. There is a constant need for this Court to review and to supervise situations where the United States through Grand Juries or through lawyers of the Department of Justice knowingly and deliberately abuses its power, i.e. the issuance of indictments, informations and offers of proof in which individuals are described but not charged as participants in a crime; or a plea bargain with its resultant guilty plea is negotiated with a corporate defendant charged with a FCPA violation and the bargain is framed in such a way that the United States describes a corporate employee such as the Petitioner as being a criminal in order to allow the criminally charged corporate criminal to plead *falsely* facts which might mitigate penalties imposed by law.

The Fifth Circuit acknowledged that the Petitioner's constitutional rights were violated when he was described but not charged as a participant in the alleged scheme to bribe Pemex officials that was the focal point in the felony charge against Harvester. The Fifth Circuit ultimately concluded that the Trial Court in the *Harvester* case did not abuse its discretion in denying the Petitioner's expungement application. It concluded that the Petitioner, as a properly indicted Defendant in the *Crawford* case, could defend himself in the *Crawford* case and that such a defense when successful would assuage the damage and loss occasioned by the United States' lawyers' description of the Petitioner in the *Harvester* case.

The Fifth Circuit did not provide or suggest the legal alchemy that would cause the Petitioner's legal victory in the *Crawford* case to be transmuted into an expungement order and procedure that would correct the problems in the *Harvester* case.

The Fifth Circuit seems to suggest incorrectly that constitutional rights as delineated by the *Briggs* and *Smith* cases can be divided or somehow placed in a conditional status. There

appears to be no support for the view that a constitutional right once violated can be restored by divided proceedings in the *Crawford* and *Harvester* cases.

ARGUMENT I

A Petitioner's constitutional right to be free of government charges of criminal conduct made with no opportunity to defend against such charges, as in the *Harvester* case, is not satisfied by saying that the Petitioner can defend himself against similar charges that have been leveled against him in the *Crawford* case.

The Fifth Circuit's affirmation of the Trial Court's denial of the Petitioner's expungement action was based upon three propositions. The Court held that:

1. Requests for expungement are reviewed on an abuse of discretion standard.

2. If the Petitioner's case was the usual case, the description of the Petitioner as an uncharged participant in the bribery scheme would have entitled him to have the references to him expunged from the pleadings. *United States* v. *Briggs*, 514 F.2d. 794 (5th Cir. 1975); *In re Smith* 656 F.2d at 1101 (5th Cir. 1981).

3. In the instant case, expungement of the references to the Petitioner from the *Harvester* pleadings was not necessary for the Petitioner could adequately defend his position and honor by defending himself against similar charges in the *Crawford* case, i.e. the government was not making an accusation against the Petitioner without the protection of trial.

The Fifth Circuit's second and third propositions are incorrect. The United States defends its position and urges that the *Crawford* case is the parent case and that a decision in the *Crawford* case favorable to the Petitioner obviates the problems caused the Petitioner in a criminal case. Harvester admits that it is guilty because the United States has strongly represented that

the Petitioner was guilty of the same crime with which Harvester was charged. The Fifth Circuit's argument that defense in the *Crawford* case is defense in the *Harvester* case is specious. The invasion of the Petitioner's constitutional rights in the *Harvester* case cannot be dealt away by a purported right to defend against actions that allegedly occurred in the separate *Crawford* case.

The separating of the Government's alleged bribery case in respect to the Petitioner and Harvester into the *Crawford* case and the *Harvester* case was the result of the Government's choice. Having elected this separation for its own tactical purposes, the Government should not be allowed to urge that its tactical election justified separation of the Petitioner's constitutional rights. The factors which the Fifth Circuit declined or failed to recognize are:

1. Constitutional rights are not conditionally guaranteed. If a constitutional right is violated, the violation occurs when the act is complete, i.e. the filing of the *Harvester* Information and Offer of Proof.

2. The "parent case" justification expoused by the United States is without merit and without foundation in the United States Constitution or the statutes promulgated hereunder. Absent a proper application of the doctrines of res judicata or collateral estoppel the resolution of issues or rights in one case is not dispositive of similar issues in other separately docketed cases. In the absence of an order consolidating the *Crawford* and *Harvester* cases for hearing and entry of opinion, a decision in the *Crawford* case would not dispose of, change or modify the issues in the *Harvester* case. A dismissal of the charges against the Petitioner in the *Crawford* case pursuant to a motion by the Petitioner based upon the Government's failure to comply with the Speedy Trial Act, the suppression of unconstitutionally obtained evidence or the violation of Petitioner's constitutional rights

would have no effect upon the Information or Offer of Proof in the *Harvester* case and would not even be a part of the record in the *Harvester* case; similarly, a dismissal of the charge against the Petitioner in the *Crawford* case pursuant to a Government motion predicated upon a lack of evidence or change in policy would not affect the record in the *Harvester* case.

An acquittal of the Petitioner in the *Crawford* case or a dismissal of the charges against the Petitioner after a mistrial resulting from a hung jury would not expunge the references to the petitioner from the *Harvester* Information and Offer of Proof. In the event of an acquittal or dismissal in the *Crawford* case, expungement of references to the Petitioner could be prevented by the Trial Court's rejection of the doctrine of res adjudicata or collateral estoppel or by the United States' successful expousal of the view that relief was barred by laches or waiver.

The Petitioner under the *Briggs* and *Smith* cases had the absolute unconditional right to expect that he would not be described as a criminal unless he was charged as a criminal. The *Briggs* case clearly outlined a procedural technique where both society's interests and the Petitioner's interests could have been protected, i.e. reference to the Petitioner as "John Doe" or "a Harvester employee" or some similar reference and the disclosure of the Petitioner's name in response to a duly filed Motion for Bill of Particulars.

Section 9 — 11.225 of the United States Attorney's Manual states that the United States will adhere to the *Briggs* rule.

In *United States* v. *Kilpatrick* 570 F. Supp. 505 (D. C. Colo. 1983) the United States espoused the *Briggs* rule in seeking protection for three Department of Justice Tax Division attorneys, i.e. by seeking to delay the publication of a 20 page Memorandum Opinion containing 17 pages of adverse comment about the three attorneys' professional conduct. The Petitioner

believes that his reputation is of the same dignity as that of Department of Justice attorneys. The Petitioner is entitled to the same measure of constitutional protection as the United States claims for its attorneys. The Government's ignoring of its own policy pronouncements in respect to the applicability of the *Briggs* rule and its invocation of the *Briggs* rule as a protection for its own people demonstrates an enforcement mindset that accepts violations of citizen's constitutional rights and a self-serving view of equal protection of all citizen's constitutional rights that is diametrically opposed to developed principles of constitutional law.

The *Briggs* and *Smith* decision and the actions of the United States in respect to the Petitioner graphically demonstrate why a citizen needs unconditional constitutional armor around his vital parts to survive attacks by a government intent to gain conviction or untoward advantage.

ARGUMENT II

The *Briggs* rule and the *Eckhardt* amendment to the FCPA protect a citizen and a corporate employee from being victimized as a scapegoat.

The enforcement of laws through the indictment or information process and the determination as to who is to be prosecuted or not prosecuted has also been committed to the Executive Department. The Executive Department's implementation of the foregoing powers is subject to and circumscribed by the guaranties of the United States Constitution.

The events surrounding the Executive Department's selection of the indictment process in the *Crawford* case and the information process in the *Harvester* case have not been the subject of judicial scrutiny. Similarly, the decision not to indict Harvester as a Defendant in the *Crawford* case has not been the subject of judicial inquiry. Charges were levelled against the Petitioner in

only the *Crawford* cases because of the double jeopardy protection of the Constitution of the United States.

The Fifth Circuit determined that there was no suggestion that the naming of the Petitioner was for any advantage to the Government.

The Fifth Circuit in explaining its affirmation of the Trial Court's denial of Petitioner's expungement application said:

> .. the trial of the indictment provides McLean with the required opportunity to put the government to its proof ... In sum, the government is not making an accusation without the protection of trial.
>
> There is no suggestion that the naming of McLean was for any advantage to the government ... Informations provide a practical tool for implementing plea bargains that accompany such investigations. The record suggests that nothing more occurred here. On these facts we are persuaded that the trial court did not abuse his discretion in refusing expungement.

U. S. v. *Harvester*, 720 F.2d 418 at 420

The Petitioner respectfully differs with the Fifth Circuit's "no advantage" analysis of the Government's actions. The Petitioner tried to demonstrate by documentation brought forward to the Fifth Circuit and written presentation that there was an advantage to both the Government and Harvester, i.e. "another scalp on the Government's enforcement belt" and " a $10,000 vs. a $1,000,000 fine for Harvester". The Petitioner respectfully states that the identification and description of the Petitioner in the *Harvester* case, as a participant in the alleged Pemex bribery scheme, produced for the United States the legal reward of a third guilty plea in the alleged Pemex bribery cases and the extraordinarily attractive financial incentive for Harvester of ending criminal litigation under an arrangement where in a

negotiated plea bargain the recommended fine was $10,000 versus the $1,000,000 fine contemplated by the Eckhardt amendment as a deterent to plea bargaining at the expense of the employee.

The results desired by the United States and Harvester could not be obtained unless there was an orchestrated plea bargain in which the United States adjusted its pleadings to set up the *respondeat superior* defense needed by Harvester. The agreed steps were:

1. The Petitioner and Uriarte would be indicted in the *Crawford* case as domestic concerns which joined CEI in a conspiracy in futherance of the alleged Pemex bribery scheme.

2. Harvester would not be included in the *Crawford* indictment but would be separately charged in its own case as a domestic concern which joined CEI in a conspiracy in futherance of the alleged Pemex bribery scheme.

3. The Petitioner and Uriarte would be named and described but not charged in the *Harvester* case as participants in the alleged Pemex bribery scheme to set up Harvester's mitigation defenses. These allegations would enable both the United States and Harvester to claim that Harvester management had no knowledge of the Petitioner's or Uriarte's participation in the alleged Pemex bribery scheme.

The potential "fly in the ointment" for *Harvester* was that it could only attain *respondeat superior* status if Harvester's management, officers and directors had no knowledge of the alleged unlawful conduct being attributed to Harvester.

Accordingly, it was agreed by the Government and Harvester that:

1. The Petitioner and Uriarte would be identified and described as managerial employees who violated Harvester's anti-bribery policy by falsely certifying that they had taken no

action in violation of the policy when the Petitioner and Uriarte in fact had participated in the alleged bribery scheme.

2. No mention would be made of the fact that the Petitioner reported directly to Sievert.

3. No mention would be made about Sievert, the President of Solar and a Harvester vice-president and officer in any of the criminal pleadings or proceedings in the *Harvester* case;

4. No reference would be made in the *Harvester* Information or Offer of Proof to overt act 24 of Count One of the *Crawford* indictment which would require disclosure of Sievert's Las Vegas meeting with CEI personnel. The Petitioner's name would be substituted for Sievert's in Overt Act #11 in the *Harvester* case.

5. No disclosure would be made by the United States that it took the position in the *Crawford* case that Sievert was a participant in the alleged bribery scheme and a participant in the Las Vegas meeting described in Overt Act #24 of Count 1 of the Crawford indictment as revealed by the United States in its answer to the Petitioner's Bill of Particulars in the *Harvester* case.

The plea bargain scenario was played out by the United States and Harvester in accordance with the agreed script. When the charade was finished, the United States and Harvester had concealed Sievert's status as a Harvester officer, established the Petitioner as a renegade employee of Harvester, and placed Harvester in the position of urging its *respondeat superior* theory.

The Petitioner acknowledges the Executive Department's discretion in respect to who will be charged with a crime, how the charges will be made and the type of plea bargains that will be made.

The Petitioner contends, however, that once the United States commences to take action against the Petitioner, those actions

must fit within a constitutionally permissible format. The negotiation of a plea bargain in which the United States adopts false positions to the detriment of the Petitioner was not then and is not now constitutionally permissible.

The *Harvester* Information and Offer of Proof violated the constitutional rights of the Petitioner as delineated in the *Briggs* and *Smith* cases. The plea bargaining between the United States and Harvester violated the fundamental right of the Petitioner to have the United States not give "false testimony" about him with the purpose of injuring him in his property and liberty interests.

The Scapegoat Problem

Congress in its wisdom adopted the FCPA to dissuade/prohibit United States corporations from bribing officials of foreign countries in order to influence their official decisions. After the adoption of the FCPA, it became apparent that significant enforcement problems could exist and that opportunities could develop where corporations subject to FCPA could take positions and actions that would be genuinely oppressive to the agents and employees of corporations subject to FCPA.

Congressman Eckhardt held hearings in respect to the enforcement problems and processes arising under the FCPA with particular focus on legislation that would minimize the opportunity for corporations to make "scapegoats" out of their employees. The Eckhardt Amendment to the FCPA provided that an agent of an issuer, as distinguished from an officer, director or other person in a policymaking position, shall not be subject to the penalties of the bill until it is shown in a separate proceeding or in the proceeding against such agent that the issuer itself was in violation of the provisions of the bill.

The Eckhardt amendment reflected Congress' concern that in some instances a low level employee or agent of the corporation — perhaps the person who is designated to make the pay-

ment — might otherwise be made the scapegoat for the corporation. The essential elements of such prosecutions would presumably take place on foreign soil. Such an agent or employee unlike the corporation possibly would not have the resources, legal or financial, to provide witnesses necessary to his defense. Accordingly the practical effect of 15 U.S.C. § 78ff(c)(3) and 15 U.S.C. § 78dd-2(b)(3) was to require the corporation to bring in witnesses to rebut the contention of its involvement. These witnesses would then be available to the agent in his defense.

The Eckhardt amendment resulted in a two tier constitutional wall being erected around the Petitioner and other corporate employees similarly situated, i.e. the constitutional protections provided by the Fifth and Sixth Amendments to the United States Constitution as delineated in the *Briggs* and *Smith* cases, *supra*, and the Fifth Amendment due process rights and Sixth Amendment trial rights flowing from a corporation's compliance with the provisions of the Eckhardt Amendment.

Harvester's answer in the Pemex suit and the plea bargain machinations set forth in stark relief:

1. Harvester's "scapegoat" attitude in respect to the Petitioner, that is, it could not verify the Justice Department's allegation of criminal conduct in respect to Harvester, the Petitioner and Uriarte before it pled guilty to the FCPA charge, but it could deny in the Pemex suit that it had ever joined a conspiracy with Crawford, Ruston or Cemco and that it collaborated with Crawford, Cemco, Ruston or CEI in preparing bids to "Cemco".

2. Harvester's intentional failure to comply with the mandates of the Eckhardt amendment by its:

(a) Blind acceptance of representations by the Justice Department and the United States that Harvester and the Petitioner have violated the FCPA;

(b) Acknowledgment that it had not verified the representations of the Justice Department while in reality, Harvester had refused written offers by the Petitioner and

Sievert to rebut the Government's allegations against Harvester;

(c) Joinder with the Justice Department in stating that the Petitioner had falsely certified that he had not participated in the alleged bribery scheme;

(d) Joinder with the Justice Department in concealing the fact that:

(i) The Petitioner, as a part of Harvester's management, reported to Sievert, a Harvester vice president;

(ii) The Justice Department identified and treated Sievert in the *Crawford* case as a participant in the alleged bribery scheme and named Sievert as a participant in Overt Act 24 of Count One in the *Crawford* indictment;

(e) Its denial in the Pemex suit that it conspired with Crawford, Ruston or Cemco or collaborated with Crawford, Cemco, Ruston or CEI in preparing bids to "Cemco".

The "success at any cost" attitude of the United States in respect to guilty pleas is evidenced by:

1) Its willingness to allege that $9,960,432.40 in bribes had been paid to DeLeon and Chavarria when the United States had not in fact traced or linked any portion of the alleged $9,960,432.40 in bribes to DeLeon and Chavarria as evidenced by Pendergast's December 1983 affidavit.

2) Its willingness to fail to disclose the fact that in the *Crawford* case it had determined that Sievert conspired to violate the FCPA and participated in Overt Act 24 of Count One in the *Crawford* indictment.

3) Its concealment of Sievert's status as a Vice President of Harvester and failure to indict Sievert in either the *Crawford* or *Harvester* cases.

CONCLUSION

Simply stated, the Petitioner's position in respect to the *Harvester* case is that:

1) The record shows a clear violation by the United States of the Petitioner's constitutional rights as delineated in the *Briggs* and *Smith* cases;

2) A "success at any cost" yearning for an additional guilty plea to affix to its FCPA enforcement banner;

3) An intentional constitutionally impermissive conduct of enforcement activities in respect to Harvester with consequent personal and professional detriment to the Petitioner;

4) The concept of fundamental fairness and constitutional conduct has been sacrificed in the improper pursuit of an FCPA enforcement goal;

5) A citizen has a right to expect an even-handed administration of justice from lawyers who have taken an oath to uphold the Constitution and the laws of the United States.

The Petitioner respectfully requests the Court issue its Writ of Certiorari.

Dated: February 27, 1984

Respectfully submitted,

GEORGE S. MCLEAN, *Pro Se*
6908 Country Club Drive
La Jolla, California 92037
(619) 459-1926 or 454-3712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83....

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

INTERNATIONAL HARVESTER COMPANY,

Defendant,

v.

GEORGE S. MCLEAN,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

Appendix

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

INTERNATIONAL HARVESTER COMPANY,
Defendant,

v.

GEORGE S. MCLEAN,
Appellant.

NO. 83-2202
SUMMARY CALENDAR.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

NOV. 28, 1983.

Appeal was taken from an order of the United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., which refused expungement of any mention of appellant by name in an information and related documents which he was named but not charged as a coconspirator. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that district court did not abuse discretion in refusing expungement of any mention of appellant, who was indicted for conspiracy to engage in international bribery, by name in information and related documents in which he was named but not charged as a coconspirator where the charges in the indictment and charges in the information were carved from the same fact pattern and were identical or closely related.

Affirmed.

1. Criminal Law — 1226(3)

Appellate court reviews decisions on requests to expunge by abuse of discretion standard granting a range of latitute to district court.

2. Indictment and Information — 137(1)

District court did not abuse discretion in refusing expungement of any mention of appellant, who was indicted for conspiracy to engage in international bribery, by name in information and related documents in which he was named but not charged as a coconspirator in a conspiracy to engage in international bribery where the charges in the indictment and charges in the information were carved from the same fact pattern and were identical or closely related.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, TATE and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

George S. McLean appeals from an order refusing expungement of any mention of him by name in an information and related documents because he was named but not charged as a co-conspirator in the information. We are persuaded that the trial court did not abuse its discretion because the base principle of our expungement cases has not been violated, in that McLean can defend the charge in an earlier filed and related case in which he is a charged defendant.

McLean, with eight other individuals and a corporation, was indicted on October 22, 1982 for conspiracy to engage in international bribery. McLean was also charged with multiple counts of aiding and abetting substantive violations of that charge.

On November 17, 1982 all ten defendants named in the October indictment were named but not charged as co-conspirators with International Harvester Company in a criminal information. Both the indictment and the information charged conspiracy to engage in international bribery. International

Harvester waived indictment, pled guilty, and was sentenced the next day. In connection with the plea of International Harvester the government filed an offer of proof. McLean's motion to expunge his name from all the documents filed in connection with the information was denied and he appeals.

While we have not been explicit as to the jurisdictional source(s) here available, we have previously found appellate jurisdiction to review rulings on such requested expungement both under 28 U.S.C. § 1291, concerning appeals from orders possessed of requisite finality, and under the All Writs Act. *United States* v. *Briggs*, 514 F.2d 794, 808 (5th Cir. 1975); *In re Smith*, 656 F.2d 1101 (5th Cir. 1981).

[1] We review decisions on requests to expunge by an abuse of discretion standard granting a range of latitude to the district court. That deference is warranted by its greater familiarity with the local scene and the actuality of local public events.

In *Briggs* we recognized the right of named but uncharged co-conspirators to expungement of reference to them by name. We there rejected suggested barriers of jurisdictions, standing, and political thickets and found that a federal grand jury exceeds its power in naming persons but not charging them. The holding was footed on the constitutioinal right of a citizen to be free of government charges made with no opportunity to defend. The reasoning was applied in terms of grand jury power but its reach was wider. Six years later in *In re Smith*, 656 F.2d at 1106-07, we applied the same principle to require expungement of references to Smith by name in factual resumes prepared by an Assistant United States Attorney and used in the sentencing proceedings of others.

[2] It follows from *Briggs* and *Smith* that McLean would be entitled to his requested expungement from the information and related documents if we put aside the fact of his earlier indictment. But that fact is critical because the trial of the indictment provides McLean with the required opportunity to put the

government to its proof. The charges in the indictment and the charges in the information are carved from the same fact pattern and are either identical or closely related. Significantly, the indictment charging McLean and the information naming but not charging him were filed within thirty days of each other. The government's "charges" in the information were little more than a repetition of charges earlier levelled against McLean by a federal grand jury. In sum, the government is not making an accusation without the protection of trial.

There is no suggestion that the naming of McLean was for any advantage to the government. With ongoing investigations into complicated transactions, indictments and informations with substantial overlap are inevitable. Informations provide a practical tool for implementing plea bargains that accompany such investigations. Among other advantages, charges agreed to in plea negotiation can be quickly drawn without the expense and inconvenience of returning to the grand jury. The record suggests that nothing more occurred here. On these facts we are persuaded that the trial court did not abuse his discretion in refusing expungement.

We say only that there was no abuse of discretion. We do not say that naming conspirators elsewhere indicted in an information is a wise policy or always legal. Indeed we see little to justify such a practice and much to argue against it, including the generation of collateral appeals and the draining of resources best spent more productively.[1]

AFFIRMED.

---

[1] McLean suggests error in various rulings made in the case in which he was indicted. We have no jurisdiction over those interlocutory orders and make no decision concerning them.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 83-2202

UNITED STATES OF AMERICA
Plaintiff-Appellee,

VERSUS

INTERNATIONAL HARVESTER COMPANY,
Defendant,

VERSUS

GEORGE S. McLEAN,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion Nov. 28, 1983, 5 Cir., 198., ...F.2d....)

(December 29, 1983)

Before BROWN, TATE and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal; Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/ PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA v. INTERNATIONAL HARVESTER COMPANY	CR. No. H-82-244

ORDER

Upon consideration of George S. McLean's Motion to Expunge and the United States' Response to said Motion, it is hereby

ORDERED that George S. McLean's Motion to expunge is denied.

s/ ROBERT O'CONOR, JR.
ROBERT O'CONOR, JR.
United States District Court Judge

DATE: March 29, 1983

APPENDIX D

U. S. CONST., amend. V.

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION: DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST., amend. VI.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

§ 78dd-1. Foreign corrupt practices by issuers

(a) It shall be unlawful for any issuer which has a class of authorities registered pursuant to section 781 of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate

commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to —

(1) any foreign official for purposes of —

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

* * *

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of —

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

§ 78dd-2. Foreign corrupt practices by domestic concerns

(a) It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, give, promise to give, or authorization of the giving of anything of value to —

(1) any foreign official for purposes of —

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

* * *

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of —

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) of this section shall, upon conviction, be fined not more than $1,000,000.

(B) Any individual who is a domestic concern and who willfully violates subsection (a) of this section shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(2) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (1) of this section shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever a domestic concern is found to have violated subsection (a) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

(d) As used in this section:

(1) The term "domestic concern" means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

§ 78ff. Penalties

* * *

(c)(1) Any issuer which violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $1,000,000.

(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.

18 U.S.C. 3, ACCESSORY AFTER THE FACT

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the

offender in order to hinder or prevent his apprehension, trial, or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

18 U.S.C. 371, CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES

If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner and for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

28 U.S.C. Section 1254(1):

SECTION 1254. COURT OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 2101(c)

SUPREME COURT; TIME FOR APPEAL OR CERTIORARI; DOCKETING; STAY

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

SUPREME COURT RULES

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 17. Considerations governing a review on certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

APPENDIX E

95TH CONGRESS 1st Session	HOUSE OF REPRESENTATIVES	Report No. 95-640

UNLAWFUL CORPORATE PAYMENTS ACT OF 1977

Mr. Staggers from the Committee on Interstate and Foreign Commerce submitted the following

REPORT
together with
MINORITY VIEWS

• • •

Liability of agents

The bill specifically provides that an agent of an issuer, as distinguished from an officer, director or other person in a policymaking position, shall not be subject to the penalties of the bill until it is shown in a separate proceeding or in the proceeding against such agent that the issuer itself was in violation of the provisions of the bill. This provision reflects the Committee's concern that in some instances a low level employee or agent of the corporation — perhaps the person who is designated to make the payment — might otherwise be made the scapegoat for the corporation. The essential elements of these prosecutions will presumably take place on foreign soil. Such an agent or employee unlike the corporation possibly would not have the resources, legal or financial, to provide witnesses necessary to his defense. Accordingly, the practical effect of sections 2(c(2) and 3(c)(2) is to require the corporation to bring in witnesses to rebut the contention of its involvement. These witnesses would then be available to the agent in his defense.

at page 11

APPENDIX F

HOUSE CONFERENCE REPORT NO. 95-831

* * * * * * * * * * *

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

* * *

2. Penalties — The Senate bill provided fines of not more than $500,000 for willful violations by issuers and penalties of up to $10,000 and/or 5 years imprisonment for willful violations by any officer, director, employee or shareholder thereof.

The House amendment provided a fine of not more than $1 million for knowing and willful violations by an issuer. Penalties for knowing and willful violations by officers, directors, agents, or natural persons in control of any issuer were similar to those provided in the Senate bill. However, an agent's liability was predicated upon a finding that the issuer violated the section. Finally, the House amendment prohibited an issuer from paying either directly or indirectly any fine imposed under this section upon any officer, director, agent or natural person in control of such issuer.

The conference substitute adopts the maximum corporate penalty in the House amendment and the penalties applicable to officers, directors, employees, and stockholders acting on behalf of the issuer as provided in the Senate bill. The conference substitute incorporates the "agent" provisions of the House amendment. To provide additional protection for agents and employees, the conference substitute predicates an employee's or agent's liability upon a finding that the issuer has violated the section. As in the House amendment, the conference substitute prohibits an issuer from paying, either directly or indirectly, any fine imposed upon any individual under this section.

at pages 12 and 13

APPENDIX G

UNLAWFUL CORPORATE PAYMENTS ACT OF 1977

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION
AND FINANCE
OF THE
U.S. CONGRESS HOUSE COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 3815 and H.R. 1602
April 20 and 21, 1977

Serial No. 95-11

Mr. Eckhardt. I would like to take up a matter with you that you really didn't take up in your testimony. Frankly, in a bill as complex as this, I have no pride of authorship. As a matter of fact, all these bills stem from many authors over a considerable period of time and the purpose of hearings like this is to throw the bill's content out for the constructive criticism of all persons who may be involved in it. Therefore, I take the liberty of criticizing the bill myself on one point and asking your opinion on it.

One thing that has come to concern me is the provision on page 4 providing that it is illegal for any agent of such issuer who knowingly and willfully carried out the practice to engage in it. I don't have any compunctions against making acts of foreign bribery illegal for the corporation. Of course, in order to prove the criminal activity, one would have to show not only that the act of bribery occurred overseas, which would be an act which would be almost totally subject to proof in a place far away from the court that made the determination, but another necessary link in the criminal chain would be the showing that some kind of official order was issued to engage in such bribery. In other words, the Defendant would always be able to marshal what evidence there was to contradict any contention that the company had anything to do with the bribery. With respect to that necessary element of the case without which a conviction could not be had, the defendant would be peculiarly in control of the evidence, both overseas evidence and domestic evidence. But this is not so with respect to the individual who is an agent of such issuer and who is being accused of an act overseas where the totality of the proof would be from activities overseas. Indeed, the corporations interest might even be in conflict with that of the agent. The corporation might desire to have Joe Bloke found to have intentionally engaged in bribery and to have been the sole moving agent, that is, the company never agreed to it and the quicker they can convict Joe Bloke, the better off the company is. It is relieved of responsibility and it has sacrificial lamb in Rome and everybody forgets about the activity. Also, there may be persons on the other side of the bribery picture. For instance, officials of Italy who might like to establish that Joe Bloke did in fact bribe a lower official and that this was not authorized and in that way remove the matter from political concern.

It does concern me a little that compulsory process is somewhat difficult when all of the facts that could be marshaled

for the defense must be obtained from a place perhaps halfway around the world. I don't find any difficulty whatsoever with the corporation's position as a defendant because indeed it has a very inside road to testimony and information. For instance, with respect to what transpired within the corporation itself, it has the records in hand, and indeed as has been said by Secretary Blumenthal, the proof of these matters without cooperation from a foreign government might be difficult. At any rate, it seems to me that there is a vast difference between the position of the individual defendant accused of having violated the act and the corporate defendant. Besides, the individual defendant can be clapped in jail and the corporation can't be clapped in jail.

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Mr. Eckhardt. I am not suggesting that it be left out. Actually, there are three levels of responsibility. First is the level on the corporation. The corporation could be fined up to $1 million in this case. Second, any officer, director, or employee of such issuer or any natural person in control of such issuer, who knowingly and willfully ordered, authorized, or acquiesced in the act or practice constituting such violation would be subject to the penalty. I would not eliminate that. The third is any agent of such issuer who knowingly and willfully engaged in the act. The agent is different from the other two. I guess he could say, "I was out of my mind when I did it and I did not direct myself to do it." But he is not in a position to bring evidence in to defend himself other than evidence which must be gotten in a foreign country. In the other two cases the evidence is either evidence that is available from the records or through the processes of the corporation in the United States or is readily available to them overseas because they are regularly doing business there. But the agent may have been back a year or so and then may be

prosecuted. He would then be called upon to prove that the act did not occur.

It would be much more difficult for him, it seems to me, to defend than either the corporate individual or the responsible corporate authority or the corporation itself. They are saying, it happened, yes, it may have happened and it may have been admitted to happen, but we had nothing to do with it. As a matter of fact, it was that irresponsible person that we improvidently sent to Rome that caused this difficulty.

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Mr. Pitt. I see the problem. I think it is a real one. I am not advocating a position one way or the other, but one other point that should be made: because of the conditional predicate — that the issuer itself be proved to have violated the act and to have made an unlawful payment under it — that, insofar as foreign acts are involved, the issuer and the agent have a community of interest; that is, the agent would be protected by the issuer in at least those cases where the issuer chooses to contest the violation.

Mr. Eckhardt. That is very important.

Mr. Pitt. That is important because the issuer might, in some cases, choose not to contest, not necessarily because it believed it had violated the law, but because it was easier to plead to a violation than to subject itself to the rigors of a trial.

Assuming that there were allegations against an agent, and the issuer did contest the allegations against it, I think the agent would be placed in the position of disproving — not what acts the issuer authorized — but only disproving what charges might be raised against him as to what his understanding was. In all instances, the burden would be on the government, it seems to me, to prove that conduct in violation of the act did occur, and

the agent would not be compelled to bear the very difficult burden of proving that an act did not occur.

Mr. Eckhardt. Of course, that is true. There is no question about that. But the thing about it is that the government would undoubtedly have both the resources and the ability to bring in witnesses from overseas whereas the individual would have a very difficult time bringing in witnesses to rebut such testimony. Of court, there is a reason why we left that in. You will note the sanction is a $10,000 fine and/or 5 years imprisonment which is relatively light for foreign bribery. I disliked it very much for that reason. I thought it was almost an invitation to use an individual as a scapegoat because it is so cheap to let him pay. So what we did was make a $1 million penalty applicable to the corporation itself and for individuals only a $10,000 penalty. We did that intentionally. We did it partially because we felt that it might be necessary to let the individual engage in plea bargaining and immunity in order to get testimony and in order to convict the corporation. Thus, it is rather important to keep the individual in as an enforcement technique. But I simply would not like to see a situation where we place such a heavy burden on an individual that we effectively deny him what is considered ordinary due process of law in this country. We might consider, for instance, removing the imprisonment provision. We might also consider some specific provisions with respect to process. In other words, if the government obtains process, the individual shall be afforded the same opportunity, even if it is at prosecutorial expense.

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Mr. Pitt. Without intending to prolong this discussion, if I might I would like to make two additional points.

One possibility which occurs to me might be to strengthen the conditional predicate which would effectively prohibit a prosecution or at least incarceration of an agent if there was not a full trial and proof of the issuer's violation. The agent would be able to avail himself of the fact that the issuer had to prove that the payment itself did not fall within the act.

Presumably, if the issuer is compelled to litigate that issue in a criminal proceeding with its rigorous standards of proof, and if the issuer fails on that, I think there should be less sympathy for an agent in that context. The issue would turn, in the agent's case, to information which the agent had in his control, what his written or oral instructions were, what he did overseas, and how he facilitated the violation. There are elements he could draw upon and would have proof of in terms of his own conduct.

The second point is that, in your concern about agents, I think you should also consider the employees of issuers, because the term "employee" is a very inclusive term. At some juncture some of the concerns that you raised about agents, even though they would not apply to officers and directors, could apply to lower level employees who might also claim that they were asked to do something and did not quite understand what it was they were doing, but nevertheless are now charged with criminal conduct.

APPENDIX H

Title 9 of the United States Attorney's Manual.

"9-11.225 *Limitation on Naming Persons Unindicted Co-conspirators*

The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severly criticized in *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1974), and other cases. In granting appellants' motion for an order of expungement in *Briggs*, the Court of Appeals held that, in charging them with criminal conduct without indicting them, the grand jury exceeded its powers and authority and that its action was a denial of due process to appellants since it deprived them of an opportunity to challenge the correctness of the grand jury's accusation. See also *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977); *Application of Jordan*, 439 F. Supp. 199 (S.D.W.Va. 1977); *United States* v. *Hansen*, 422 F. Supp. 430 (E.D. Wis. 1976).

"Primarily on the basis of *Briggs*, the American Bar Association has recently adopted as part of its policy on the grand jury, the following statement of principle. "The grand jury shall not name a person in an indictment as an unindicted co-conspirator in a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars: (Principle 7 of 25 principles).

"The Department did not oppose the Adoption of this Principle by the ABA and generally concurs in it. As the court in *Briggs* pointed out, there is no need ordinarily to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known." The identity of the person can be supplied, upon request, in a bill of particulars. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke

the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

"Accordingly, in the absence of some sound reason (e.g., where the fact of the person's conspiratorial involvement is a matter of public record or knowledge), it is not desirable for United States Attorneys to identify unindicted co-conspirators in conspiracy indictment."